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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 44

R. K. PROCUNIER, Director of the California Department of Corrections, *Petitioner,*

vs.

VERON ATCHLEY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR THE PETITIONER

PETITIONER'S REPLY ARGUMENT

I

THE PROCEDURE FOLLOWED BY THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF ATCHLEY'S STATEMENT COMPLIED WITH THE REQUIREMENTS OF JACKSON V. DENNO.

At trial Atchley had a constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Jackson v. Denno,* 378 U.S. 368 (1964). He now argues that there was no finding at the trial level

that his statement to Travers was voluntary. He relies on the record's failure to show that the trial judge ever specifically stated that the confession was "voluntary" and the lack of specific instructions to the jury from which they could determine whether the confession was voluntary.

Atchley was entitled to no more than one determination on the issue of the voluntariness of his statement. We do not contend that this determination was made by the trial jury.[1] We submit that the trial judge, by his act of allowing this statement to go to the jury, made a clear finding that it was voluntary.

California has long followed the "Massachusetts" or "Humane" procedure for the admission of confessions. See *Jackson v. Denno,* 378 U.S. 368, 418 (1964), App. A to Justice Black's opinion. In California the trial court must first determine from the attendant circumstances whether the confession was free and voluntary. *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). This places upon the prosecution the burden of laying a foundation for the introduction of a confession by preliminary proof which satisfies the trial court that the confession was freely and voluntarily made. Before a confession may be received into evidence the defendant, upon request, must be accorded the opportunity to introduce evidence to overcome the prima facie showing of the prosecution. It

[1]If the trial court erred in failing to give specific instructions to the jury on the issue of the voluntariness of this statement such error would be one of state law only, to be decided by the state courts and its impact to be weighed under the California harmless error rule. See Calif. Const. Art. VI, § 13; *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956).

is then the function of the trial court in the first instance to resolve any conflict in the evidence going to voluntariness. *People v. Gonzales, supra.* If the trial court concludes that the confession was not free and voluntary, it "is in duty bound to withhold it from the jury's consideration". *People v. Gonzales, supra.* However, if there is evidence that the confession was free and voluntary, it is within the discretion of the trial court to submit to the jury for its determination, albeit redundant, the question of whether under all the circumstances the confession was freely and voluntarily made. *People v. Gonzales, supra.*

Atchley received his constitutionally required finding on the issue of voluntariness when the trial judge did not remove the statement from evidence at the close of the case. There was no conflict in the evidence concerning the circumstances surrounding Atchley's statement to Travers. Hence, the question of that statement's voluntariness was clearly decided when the trial judge, who was aware that he was required to withhold it from the jury if it was involuntary (App. 127), permitted the case to go to the jury with the confession in the record.[2]

Atchley argues that the trial court did not follow these procedures because it did not instruct the jury specifically that the question of the voluntariness of

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[2]"In jurisdictions . . . following the Massachusetts procedure, . . . the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary." *Jackson v. Denno, supra,* 378 U.S. at 378-379.

his confession was for their ultimate decision. A defendant is entitled to have the jury instructed appropriately on this subject only if he so requests. Once the trial court has itself found the confession voluntary, the rule of *Jackson v. Denno* is satisfied and failure to instruct the jury, even if requested, is merely a matter of state law and not a federal question. Whether the jury has been properly instructed on the voluntariness issue is totally irrelevant to the question of whether there has been compliance with *Jackson v. Denno.*

Atchley further complains that most of the evidence on voluntariness was presented to the trial court in front of the jury. While it is undoubtedly better procedure to hear the evidence in the absence of the jury since the trial court runs the risk of having to declare a mistrial if the statement is found to be involuntary, there is no constitutional requirement that such evidence not be taken in their presence. See *Pinto v. Pierce,* 389 U.S. 31 (1967); compare, *United States v. Feinberg,* 383 F.2d 60, 69-70 (2nd Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968).

Eleven years after his trial Atchley can only point to one factor which he claims shows his confession was involuntary that was not considered by the trial court. Neither the trial court, nor the California Supreme Court, was faced with the contention that because he had not been advised of his constitutional right to silence his confession was involuntary. However, this Court has held that the denial of a request for counsel or the failure to advise the defendant of his right to silence, while factors tending to show

involuntariness, will not by themselves support a reversal of cases tried prior to *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966). *Johnson v. New Jersey*, 384 U.S. 719, 730-32 (1966).

II

THE CALIFORNIA SUPREME COURT'S HOLDING ON DIRECT REVIEW OF ATCHLEY'S CONVICTION THAT HIS CONFESSION WAS VOLUNTARY IS ENTITLED TO THE PRESUMPTIVE VALIDITY CONFERRED BY TITLE 28, UNITED STATES CODE, SECTION 2254(d).

Atchley characterizes this case as one where no decision on the issue of voluntariness was made by either the trial court or the trial jury. We submit that this is an incorrect reading of the record because a finding of voluntariness was made by the trial judge (Arg. I, *supra*). However, even if no decision had been made in the trial court Atchley would not be entitled to relief unless the finding of the California Supreme Court that his statement was voluntary is either disregarded or found erroneous.

Because Atchley was under a sentence of death, his appeal to the California Supreme Court was automatic (Calif. Pen. Code § 1239, subd. [b]). The question he raised was of first impression in our jurisdiction on the procedures to be followed for the introduction of a defendant's "admission" as distinguished from his "confession". The California Supreme Court's opinion in this case clarified the ambiguity arising from some of its earlier opinions by clearly holding that any statement by an accused relative to the offense charged is inadmissible against him if

made involuntarily. *People v. Atchley,* 53 Cal.2d at 170, 346 P.2d at 769.

In reviewing Atchley's claims that his statement was involuntary the California Supreme Court, on direct review, assumed the duty of examining the uncontradicted facts in order to determine *independently* whether the statement was voluntary. *People v. Berve,* 51 Cal.2d 286, 290-91, 332 P.2d 97, 100 (1958). This is the accepted procedure followed by California appellate courts in reviewing contentions that involuntary statements were admitted into evidence. See *People v. Trout,* 54 Cal.2d 576, 583, 6 Cal.Rptr. 759, 763 (1960).[3] This procedure is the same as followed by this Court when the issue is whether or not a coerced confession was admitted. This Court determines "independently whether petitioner's confession was so obtained, by review of the facts upon which that issue necessarily turns". *Chambers v. Florida,* 309 U.S. 227, 228-29 (1940). See also *Lisenba v. California,* 314 U.S. 219, 237 (1941); *Ashcraft v. Tennessee,* 322 U.S. 143, 147-48 (1944); *Malinski v. New York,* 324 U.S. 401, 404 (1945); and *Payne v. Arkansas,* 356 U.S. 560, 562 (1958).

Thus, the scope of appellate review on the issue of whether Atchley's statement was coerced materially differs from the scope of appellate review applied to

[3]In *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 909, 31 Cal.Rptr. 800 (1963), the California Supreme Court discussed the proper role of an appellate court in reviewing a lower court's judgment that a certain book is pornographic. That court concluded that it must make the same "independent examination" of the whole record as it does in confession cases because the constitutionally protected right to free speech is involved. *Zeitlin v. Arnebergh,* 59 Cal.2d at 910 n.12, 31 Cal.Rptr. 805 n.12.

other findings of fact by the trial court.[4] Wherefore, we respectfully submit that the determination of the California Supreme Court on direct review of Atchley's conviction that his confession to Travers was voluntary was a "determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state . . . were parties, evidenced by a written finding . . .". Hence, it was entitled to the presumption of validity conferred by Title 28, United States Code, section 2254(d). Since there are no findings in the opinion of the district court that there were any infirmities in this determination of the California Supreme Court the writ should have been denied.

The California Supreme Court opinion in *People v. Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959), is unlike that of the Nebraska Supreme Court in *Parker v. State*, 83 N.W.2d 347 (1957), which was recently reviewed by this Court in *Sigler v. Parker*, 396 U.S. 482 (1970). Darrell Parker had been convicted of first degree murder and sentenced to life imprisonment. During the course of his trial numerous confessions were admitted into evidence. In affirming his conviction the Nebraska Supreme Court set forth in its opinion the standards by which the admissibility of those statements were weighed. Those standards were inconsistent with the requirements of *Jackson v.*

[4]With other findings of fact the appellate court must adopt them if they are supported by any evidence in the record. The reviewing court may not draw inferences adverse to the judgment. *People v. Miller*, 71 Cal.2d 459, 78 Cal.Rptr. 449, 457 (1969).

Denno, 378 U.S. 368 (1964). Parker, claiming his confessions were improperly admitted, sought post-conviction relief in the state courts. Relief was denied in opinions which merely adopted the original findings of the trial court that the confessions were voluntary. The United States District Court, holding that the trial court's finding that the confessions were voluntary had tainted all subsequent determinations of this issue on direct review and collateral attack, granted a writ of habeas corpus. This Court ordered the matter resubmitted to the state courts so that they could make the initial determination of that issue. *Sigler v. Parker,* 396 U.S. at 484.

In contrast, the California Supreme Court on direct review of Atchley's conviction exercised an independent review of the record on the issue of the voluntariness of Atchley's statement to Travers. The California Supreme Court detailed in its opinion the standards by which this issue was resolved and those standards fully complied with the requirements prescribed by this Court. Hence, in no way can it be said that the trial court's determination tainted the California Supreme Court's finding reached after an independent review of the record.

III

THE TAPE RECORDING OF ATCHLEY'S CONVERSATION WITH TRAVERS WAS PROPERLY INTRODUCED

Relying on *Katz v. United States,* 389 U.S. 347 (1967), Atchley contends that because his statement

with Travers was recorded without his knowledge it must be held to be involuntary as a matter of law. Since Atchley knew that Travers was not going to hold this conversation in confidence.[5] *Katz v. United States, supra,* is of course inapplicable. Moreover, this Court has limited the rule of *Katz v. United States,* 389 U.S. 347 (1967), to prospective application. *Desist v. United States,* 394 U.S. 244, 246 (1968).

In any event, *Katz v. United States, supra,* did not render inadmissible recordings of conversations between two persons made with the consent of one of the parties. In *United States v. Kaufer,* 406 F.2d 550 (2nd Cir. 1969), an Internal Revenue Service agent with the consent of one party listened in on the defendant's telephone conversation. Later, another Internal Revenue Service agent recorded his conversation with the defendant by means of a device concealed in an attache case. The agent testified and the recordings were presented in evidence. The court held that since the recordings were made with the consent of one of the parties they were admissible. This Court granted certiorari and affirmed in a per curiam opinion. *Kaufer v. United States,* 394 U.S. 458 (1969).

Since Atchley was aware that his statements to Travers were to be communicated to others the fact that it was recorded without his knowledge would not render it inadmissible. Compare, *Hoffa v. United*

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[5]Mr. Mulkey [District Attorney]: "You in fact indicated to him that this would have to be reported to your company as far as whatever information he gave you, did you not?

Travers: Yes, absolutely.

Q. So he understood that when he was talking to you?

A. Oh, yes." (App. 142-143.)

States, 385 U.S. 293, 300-03 (1966); *Lopez v. United States,* 373 U.S. 427, 438 (1963).

IV

THE WRIT OF HABEAS CORPUS SHOULD BE DENIED WHERE THE STATE HAS AFFORDED ADEQUATE CORRECTIVE PROCESS.

Atchley misconstrues our request for reform of federal habeas corpus as a call for abolition of the writ. We do not ask this Court to abolish federal review of state court conviction on habeas corpus. Only Congress could do that. What we do ask, and most urgently, is that federal review be redirected so that a criminal conviction may be afforded finality where it appears from the opinion of a state appellate court that the prisoner has been afforded a fair hearing on the issues he sought to raise. Whether this be done by interpretating section 2254(d) to include state appellate court opinions, or by the exercise of this Court's rule making power, as was done in *Brown v. Allen,* 344 U.S. 443 (1953), *Townsend v. Sain,* 372 U.S. 293 (1963) and *Fay v. Noia,* 372 U.S. 391 (1963), is of little moment. As pointed out in the Opening Brief, the need for reform is compelling and the opportunity for reform is present in this case.

From the face of the California Supreme Court opinion, it is apparent that Atchley received a thorough hearing and independent review of his claim that his confession was involuntary. It is also apparent that the state courts correctly resolved the question.

Atchley has at no time even suggested that the California appellate process denied him fairness. Thus, the District Court should have accepted the California Supreme Court resolution of his claim and denied the writ. Instead, the district court ordered a further hearing in the state court, with the likelihood of further appeals and collateral proceedings if Atchley loses again. The People of the State of California deserve better than this.

CONCLUSION

R. K. Procunier, Director of the California Department of Corrections, and petitioner herein, respectfully requests this Court to remand the case to the Ninth Circuit Court of Appeals with directions to reverse the order of the district court granting the writ, and to direct the Court of Appeals to order the district court to deny Atchley's petition for the writ of habeas corpus.

Dated, San Francisco, California,
November 12, 1970.

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